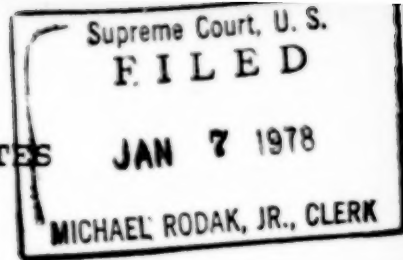


IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1977  
No. 77-822



In the Matter of the Application of  
JOHN LANE, JR.,

Appellant,

for a Judgment Under Article 78 of  
the Civil Practice Law and Rules,  
etc.

-against-

NORMAN F. GALLMAN, President, et al.,  
Constituting the STATE TAX COMMISSION  
OF THE STATE OF NEW YORK,

Respondents.

MOTION TO DISMISS OR AFFIRM  
ON BEHALF OF RESPONDENTS  
STATE TAX COMMISSION OF  
THE STATE OF NEW YORK

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1977  
No. 77-822

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In the Matter of the Application of  
JOHN LANE, JR.,

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etc.

-against-

NORMAN F. GALLMAN, President, et al.,  
Constituting the STATE TAX COMMISSION  
OF THE STATE OF NEW YORK,

Respondents.

---

MOTION TO DISMISS OR  
AFFIRM

This appeal raises the question  
whether a substantial constitutional  
question was properly raised in the  
Court below.

The Nature of the Case

The appellant was domiciled in  
New York State throughout 1965. He  
resided with his parents in the State  
more than 30 days--from January 1,  
through February 28, 1965. He had no

2.

permanent place of abode and spent no  
time in New York State between March 1,  
1965 and December 31, 1965. During this  
later period, the appellant maintained  
a permanent place of abode outside of  
New York State.

On these findings of fact the  
respondents issued a final determination  
that the appellant was a resident of New  
York State for the entire year under the  
provisions of New York Tax Law, § 605.  
As a result, his income earned outside of  
New York State for the period between  
March 1, 1965 and December 31, 1965 was  
held to be subject to New York State in-  
come taxes. The respondent sustained a  
tax deficiency in the amount of \$50.75  
including interest and the claim for  
refund of income tax withheld for 1965  
in the amount of \$35.00 was denied.

Thereafter the appellant brought  
a proceeding in the nature of certiorari  
for judicial review of the determination

of the respondents. The initial judicial disposition of the proceeding was made by the Appellate Division, Third Department of the Supreme Court of the State of New York. Nowhere in the record nor in the briefs in the Appellate Division does it appear that the appellant raised any constitutional question. The Appellate Division, in its decision, after reviewing the determination of the respondents held:

"We cannot say that the Tax Commission's interpretation of these provisions is irrational or unreasonable since it is entirely consistent with prior case law on related topics (Matter of Kritzik v. Gallman, 41 A D 2d 994; People ex rel. Mackall v. Bates, 278 App. Div. 724; Matter of Rothfeld v. Graves, 264 App. Div. 54, affd. 289 N.Y. 583). Accordingly, its construction must be upheld (cf. Matter of Howard v. Wyman, 28 N Y 2d 434, 438)."

The appellant subsequently made a motion in the Appellate Division for reargument or in the alternative for permission to appeal to New York State's highest Court, the Court of Appeals. His motion was denied.

The appellant then made a motion in the Court of Appeals for leave to appeal to that Court. His motion was denied. The appellant filed a notice of appeal to the Court of Appeals. The record and briefs were filed in the Court of Appeals on the appeal. Thereafter on April 28, 1977 the Court of Appeals dismissed the appeal sua sponte upon the grounds that no substantial constitutional question is directly involved.

The appellant, thereafter, made a motion to vacate the sua sponte order of the Court of Appeals dated April 28, 1977. The Court of Appeals denied the



motion. On December 9, 1977, the jurisdictional statement in the Supreme Court of the United States in this matter was received in this office.

#### Statutes Involved

New York Tax Law, §§ 605 and 654 provide in pertinent part:

"605. Resident and nonresident defined

"(a) Resident individual. A resident individual means an individual:

"(1) who is domiciled in this state, unless he maintains no permanent place of abode in this state, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state, or

"(2) who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state, unless such individual is in the armed forces of the United States during an induction period.

"(b) Nonresident individual. A nonresident individual means an individual who is not a resident.

"(c) \* \* \*."

"§ 654. Change of resident status during year

"(a) General. If an individual changes his status during his taxable year from resident to nonresident, or from nonresident to resident, he shall file one return as a resident for the portion of the year during which he is a resident, and one return as a nonresident for the portion of the year during which he is a nonresident, subject to such exceptions as the tax commission may prescribe by regulation.

"(b) \* \* \*."

## ARGUMENT

THE APPEAL SHOULD BE  
DISMISSED BECAUSE THE  
APPELLANT HAS NOT RAISED  
A SUBSTANTIAL FEDERAL  
QUESTION IN THE COURT BELOW.

In a certain sense every question as to enforcement of a statute involves its constitutionality. The Appellate Division held merely that the definition of "resident" was proper on the facts presented. This is a question of interpretation, not of constitutionality. The Court of Appeals in dismissing the appellant's appeal sua sponte did so on the ground that no substantial constitutional question was presented to it.

It is essential to the exercise of this Court's jurisdiction under 28 U.S.C. § 1257 that a substantial federal question be raised before the highest State court. The remittitur of the Court of Appeals does not show that any constitutional question,

substantial or unsubstantial, was properly presented to it. The respondents in their brief in the New York Court of Appeals argued that the appellant's appeal to that Court could not be taken as of right from a judgment of the Appellate Division which unanimously confirmed a determination of the respondents when no constitutional question was raised in the Appellate Division. The appellant argues that the letter of his attorney to the Appellate Division dated October 1, 1975 raised a constitutional question. It is submitted, however, that the letter merely discusses the words "resident" and "domicile" but did not raise a constitutional question, nor did the respondents raise a constitutional question in the Appellate Division. The respondents in their brief in the Appellate Division merely

stated that the United States Supreme Court has upheld the right of the State to tax a person domiciled therein on income derived from outside sources.

This Court, it is submitted, should dismiss the appeal because of want of jurisdiction. See, Lanza v. New York, 370 U. S. 139, 142, n. 6 (1962); Ungar v. Sarafite, 376 U. S. 575, 582-583 (1964); Willner v. Committee on Character, 373 U. S. 96, 104 (1963).

It is submitted that domicile within a state is a valid basis for the imposition of an income tax by states. This Court in Miller Bros. Co. v. Maryland, 347 U. S. 340 (1954), citing Maguire v. Trefry, 253 U. S. 12; Lawrence v. State Tax Comm'n, 286 U. S. 276; New York ex rel. Cohn v. Graves, 300 U. S. 308; Guaranty Trust Co. v. Virginia, 305 U. S. 19, said at page 345:

"Thus, the Court has frequently held that domicile or residence, more substantial than mere presence in transit or sojourn, is an adequate basis for taxation, including income, property and death taxes."

The definition of "resident" in the New York Tax Law, therefore, does not present a constitutional question since it includes more than domicile alone.

#### CONCLUSION

THE APPEAL SHOULD BE  
DISMISSED.

Dated: January 4, 1978

Respectfully submitted,

LOUIS J. LEFKOWITZ  
Attorney General of the  
State of New York  
Attorney for Respondents

RUTH KESSLER TOCH  
Solicitor General  
of the State of New York

FRANCIS V. DOW  
Assistant Attorney General  
of the State of New York

of Counsel



STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition  
of

JOHN LANE, JR.

for a Redetermination of a Deficiency or for Refund of  
Personal Income Tax under Article 22 of the Tax Law  
for the Year 1965.

John Lane, Jr. filed a petition under section 639 of the Tax Law for the redetermination of a deficiency and for refunds in personal income tax under Article 22 of the Tax Law for the year 1965. In lieu of a hearing, the petitioner, without counsel, and the Income Tax Bureau, by Edward H. Best, Esq. (Francis X. Boylan, Esq., of Counsel), have submitted the file pertaining to the deficiency to the State Tax Commission. Said file has been duly examined and considered.

ISSUE

The issue in this case is whether a domiciliary of this State who changed his abode during 1965 is a resident for the entire year or whether he can be considered a nonresident for part of the year under section 603 of the Tax Law, and thus entitled to file a nonresident return for part of the year under section 634 of the Tax Law.

FINDINGS OF FACT

1. Petitioner was, during 1965 and prior years, a domiciliary of New York State.

2. Until March 1, 1963, petitioner resided with his parents in Yonkers, New York. He finished law school in June, 1964, and worked for a New York City law firm until February, 1965. He applied for a direct commission into the Air Force Reserve and received a commission in January, 1965.

3. On March 1, 1963, petitioner reported to his duty station at the office of the General Counsel, United States Air Force, Pentagon Building, Washington, D.C. From March until November, 1963 he rented an apartment in Arlington, Virginia under a six month lease. He then moved to another rented apartment in Alexandria, Virginia which he held under a yearly lease and which he kept until 1967. Both apartments were chosen so as to be suitable after petitioner's planned marriage in September, 1963.

4. Petitioner spent more than 30 days in New York State between January 1, 1963, and February 23, 1963. He spent no time in New York State between March 1, 1963, and December 31, 1963.

5. The deficiency amounts to \$50.75 including interest. The refund claimed is for withholding tax in the amount of \$35.20.

CONCLUSIONS OF LAW

Petitioner was a New York resident, as defined in section 603 of the Tax Law, for the entire year 1965 and was not entitled to file a return for part of 1965 under section 634 of the Tax Law as a nonresident. Petitioner did not change his domicile during 1965. Furthermore, he remained a New York resident since he had no place of abode outside of New York for the entire year 1965, and he did maintain a place of abode in New York for

BEST COPY AVAILABLE



part of such year. We must reject petitioner's argument that he satisfied the conditions of section 605(a)(1) when only the latter part of 1963 is considered and that therefore he should be considered a nonresident for that part of the year. The acquisition of a new place of abode or the abandonment of an old place of abode during a taxable year does not cause a change in residence during such taxable year.

The provisions defining residence in terms of permanent place of abode were added to the income tax law (see section 350 subdivision 7 of Article 16 of the Tax Law, the predecessor of section 605) by Chapter 425 of the Laws of 1922 to affect only those individuals who continuously from year to year claim a domicile in one state but actually maintain a home in another state with some degree of permanence. These provisions have been interpreted to mean that the requisite permanent place of abode must exist for the entire taxable year.

The further provisions added by chapter 462 of the Laws of 1934 relating to New York domiciliaries and imposing the dual requirement that a domiciliary maintain no permanent place of abode in New York and maintain a permanent place of abode outside of New York have been interpreted to impose two separate requirements relating to a permanent place of abode each of which must be met for the entire taxable year in question and neither of which has been met by this petitioner. The provisions of section 654 of the Tax Law relating to two returns thus apply only where there is a change in residence by reason of a change of domicile during the taxable year. These provisions have never been held to apply where there is only an acquisition or abandonment of a place of abode even though they were added to the predecessor of section 654 (section 367-a of Article 16 of the Tax Law) by the same law (chapter 425 of the Laws of 1922), that de-

finer residence in terms of a permanent place of abode. This construction of the law has been upheld by the courts in *People ex rel. Mackell v. Bates*, 273 App. Div. 724.

#### DECISION

The petition is denied. The refunds are denied. The deficiencies are affirmed together with such interest, if any, as may be due under section 684 of the Tax Law.

Dated: Albany, New York, March 16, 1972.

#### STATE TAX COMMISSION

/s/ NORMAN F. GALLMAN  
Commissioner

/s/ A. BRUCE MANLEY  
Commissioner

/s/ MILTON KORNBERG  
Commissioner

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LETTER FROM APPELLANT TO PRESIDING JUSTICE  
OF APPELLATE DIVISION, 3RD DEPARTMENT,  
DATED OCTOBER 1, 1975

Re: Lane v. Gallman, Index No.  
7478-3 Argued September 17,  
1975. No. 25356

Honorable Sir:

Respondents (brief, p. 10) referred  
the Court to "The New York State Personal  
Income Tax," by John Chalmers, Ph.D.,  
(1948), pp. 30-42.

Nothing therein conflicts with our  
view of the law as set forth in Petition-  
er's main and reply memoranda. In fact,  
the meaning of such words as "non-resi-  
dent" and "domicile" as understood in the  
years when they were being incorporated  
into the statute (see pp. 34 and 35) are  
completely in accord with Petitioner's  
position.

One of the sources cited by Chalmers  
is a symposium of eight articles with an  
introduction by Roswell Magill on State

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Income Taxation published in the Iowa Law  
Review (Vol. XXII, No. 2, 1937, copy of  
which has been made available for the  
convenience of the Court). Helpful here  
are:

1. "State Jurisdiction to Tax Income,"  
by Henry Rottschaefer, Professor of Law,  
University of Minnesota (p. 292, espec.  
pp. 310-311, and cases cited: Kennedy v.  
Com'r. 256 Mass. 426, 152 N.E. 747, 1926,  
Greene v. Wisconsin Tax Comm., 266 N.W.  
270, Wis., 1936)

[The most recent decision on the  
same problem as, and in accord with, the  
Kennedy case, supra, was the case cited  
to the Court on argument: District of  
Columbia v. Davis, C.C.A.-D.C. (1967),  
371 Fed. 2d 964, cert. denied, 386 U.S.  
1034, 87 Sup. Ct. 1487, 18 L. ed. 2d 598.]

2. "Administration of the Personal  
Income Tax Law in New York State," by Roy

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H. Palmer, First Assistant Director, New York State Income Tax Bureau (p. 313), espec. "Residence" pp. 322-326.

None of the foregoing mentions the addition of Sec. 367-a (predecessor to Sec. 654) to the Tax Law by Chapter 425 of the Laws of 1922 (copy enclosed). It obviously relates to the subject matter referred to by Rottschaefer (see Item 1, supra).

Respectfully yours,

S/ John Lane

Supreme Court—Appellate Division  
City and County of New York

*M. L. A-8*

APPENDIX C

October 23, 1975.

25356

In the Matter of JOHN LANE, JR., Petitioner,  
v.  
NORMAN F. GALLMAN et al., Constituting the  
State Tax Commission, Respondents.

Proceeding pursuant to CPLR article 78 (transferred to this court by order of the Supreme Court at Special Term, entered in Albany County) to review a determination of the State Tax Commission which denied petitioner's application for a redetermination of a deficiency and for a refund in personal income tax for the year 1965.

Individuals subject to the New York personal income tax are classified as either residents or non-residents as those terms are defined by section 605 of the Tax Law. Section 654 of the Tax Law governs those situations in which an individual's status as a resident or a non-resident changes during his taxable year. Claiming that his former resident status had changed during 1965, petitioner invoked section 654 and computed his tax liability for that year under its provisions. The Tax Commission disagreed, determining that a higher tax amount was due from him as a resident, and this proceeding ensued when petitioner's application for a redetermination of a deficiency and claim for a refund was denied.

The facts are undisputed. Petitioner remained a New York domiciliary throughout the tax year in question although he left his former permanent abode in Yonkers on March 1, 1965 when he entered military service. For the balance of that year he maintained a permanent abode at different locations in the State of Virginia and did not return to New York. Sometime after 1965 he abandoned his domicile in this jurisdiction.

Insofar as it relates to this case, a resident individual is defined as one " \* \* \* who is domiciled in this state, unless he maintains no permanent place of abode in this state maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state" (Tax Law, § 605, subd. [a], par. [1]). Petitioner insists that since he met the conditions of exception after March 1, 1965, his status had changed to that of a non-resident during the tax year. The Tax Commission, on the other hand, interprets the conditions of exception as applying to an entire taxable year and concludes that, when so measured, petitioner failed to remove himself from the resident classification during 1965 because he maintained a permanent abode and spent more than 30 days in this

APPENDIX C

Supreme Court—Appellate Division  
Third Judicial Department

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25356

State. Under this construction, as petitioner correctly observes, it would be impossible for him to effect a change in his resident status during any taxable year without making a corresponding change in his domicile. However, merely because section 654 of the Tax Law contains a procedure to be followed when a change in status occurs during a tax year, it does not necessarily follow that such a change is thereby authorized or made possible in every circumstance. We cannot say that the Tax Commission's interpretation of these provisions is irrational or unreasonable since it is entirely consistent with prior case law on related topics (Matter of Kritzik v. Gallman, 41 A D 2d 994; People ex rel. Mackall v. Bates, 278 App. Div. 724; Matter of Rothfeld v. Graves, 264 App. Div. 34, affd. 209 N.Y. 583). Accordingly, its construction must be upheld (cf. Matter of Howard v. Wyman, 28 N Y 2d 434, 438).

Determination confirmed, and petition dismissed, without costs.

SWEENEY, J. P., KANE, KOREMAN, MAIN and LARKIN, JJ., concur.

Supreme Court—Appellate Division  
Third Judicial Department

A-10

January 7, 1976

25356 - In the Matter of JOHN LANE, JR., Petitioner,  
v.  
NORMAN F. GALLMAN et al., Constituting the  
State Tax Commission, Respondents.

Motion for reargument or, in the alternative, for permission to appeal to the Court of Appeals, denied, without costs.

KOREMAN, P. J., SWEENEY, KANE, MAIN and LARKIN, JJ., concur.



State of New York,  
Court of Appeals

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APPENDIX D

*At a session of the Court, held at Court of  
Appeals Hall in the City of Albany  
on the twenty-fifth day  
of March A. D. 1976*

Present, HON. CHARLES D. BREITEL, Chief Judge, presiding.

3 No. No. 228 -  
In the Matter of  
the Application of John Lane,  
Jr., Appellant,  
For a Judgment Ac.  
vs.  
Norman F. Gallman, President,  
&ors., constituting the State  
Tax Commission, Respondents.

A motion for leave to appeal to the Court of Appeals  
in the above cause having heretofore been made upon the part of  
the appellant herein and papers having been submitted thereon  
and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby  
is denied.

Joseph W. Bellacosa  
Joseph W. Bellacosa  
Clerk of the Court

State of New York,  
Court of Appeals

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*At a session of the Court, held at Court of  
Appeals Hall in the City of Albany  
on the twenty-eighth day  
of April A. D. 1977*

Present, HON. CHARLES D. BREITEL, Chief Judge, presiding.

3 No. No. 424 SSD 39  
In the Matter of  
the Application of John Lane,  
Jr., Appellant,  
For a Judgment Ac.  
vs.  
Norman F. Gallman, President,  
&ors., constituting the State  
Tax Commission, Respondents.

The appellant having filed notice of appeal in the above  
title and due consideration having been thereupon had, it is  
ORDERED, that the appeal be and the same hereby is  
dismissed without costs, by the Court sua sponte, upon the ground  
that no substantial constitutional question is directly involved.

Joseph W. Bellacosa  
Joseph W. Bellacosa  
Clerk of the Court

State of New York,  
Court of Appeals

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At a session of the Court, held at Court of  
Appeals Hall in the City of Albany  
on the \_\_\_\_\_ ninth \_\_\_\_\_ day  
of \_\_\_\_\_ September \_\_\_\_\_ A. D. 1977

Present, HON. CHARLES D. BREITEL, Chief Judge, presiding.

3 Mo. No. 880  
In the Matter of  
the Application of John Lane,  
Jr., Appellant,  
For a Judgment &c.  
vs.  
Norman F. Callman, President,  
&c., constituting the State  
Tax Commission, Respondents.

A motion having heretofore been made upon the part  
of appellant to vacate this Court's order of dismissal dated  
April 28, 1977 &c. and papers having been submitted thereon and  
due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same  
hereby is denied.

Joseph W. Bellacosa  
Joseph W. Bellacosa  
Clerk of the Court

A-14

SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION : THIRD JUDICIAL DEPARTMENT

----- x  
In the Matter of the Application of :  
JOHN LANE, JR., :

Petitioner, :

Index No. 7478-73

For a Judgment under Article 78 of the :  
Civil Practice Law and Rules Reversing :  
a Determination of the State Tax Com- :  
mission and Granting Petitioner's :  
Application for a Redetermination of :  
Deficiency and for a Refund of Personal :  
Income Tax under Article 22 of the Tax :  
Law for the Year 1965, :

-against- :

NORMAN F. GALLMAN, President, A. BRUCE :  
MANLEY and MILTON KOERNER, constituting :  
the STATE TAX COMMISSION OF THE STATE :  
OF NEW YORK, :

Respondents. :

----- x  
NOTICE OF APPEAL TO THE SUPREME COURT  
OF THE UNITED STATES

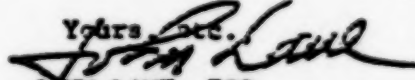
NOTICE IS HEREBY GIVEN that John Lane, Jr., the  
Appellant above named, hereby appeals to the Supreme Court of  
the United States from the final order of the Court of Appeals  
of the State of New York, dated and entered in this proceeding  
on April 28, 1977, dismissing the appeal then pending before it.

from the final order of the Appellate Division of the Supreme Court, Third Judicial Department, dated and entered in the office of the Clerk of said Court on the 27th day of October, 1975, confirming a determination of the Respondent State Tax Commission of the State of New York, and dismissing the petition in this proceeding.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Dated: New York, N.Y.

December 5, 1977

Yours, etc.  
  
JOHN LANE, ESQ.  
Attorney for  
Petitioner-Appellant  
Office & P.O. Address  
14 Wall Street  
New York, N.Y. 10005  
(212) 233-7780

TO: LOUIS J. LEFKOWITZ, ESQ.  
Attorney General of the  
State of New York  
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Francis V. Dow, Esq.  
Assistant Attorney General  
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Albany, New York 12224  
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Honorable Clerk of the Court  
Supreme Court of the State of New York  
Appellate Division, Third Judicial Department  
Justice Building, Empire State Plaza  
Albany, New York 12223